

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
MARSHALL DIVISION**

**ARCHER AND WHITE SALES, INC.**

**Plaintiff,**

**v.**

**HENRY SCHEIN, INC., DANAHER  
CORPORATION, INSTRUMENTARIUM  
DENTAL, INC., DENTAL EQUIPMENT,  
LLC, KAVO DENTAL TECHNOLOGIES,  
LLC, AND DENTAL IMAGING  
TECHNOLOGIES CORPORATION,**

**Defendants.**

**Civil Action No. 2:12-CV-00572-  
JRG**

**JOINT STATUS REPORT**

Pursuant to the Court's February 15, 2019 Order, Dkt. No. 407, the parties hereby submit this joint status report regarding the effect of the Supreme Court's decision in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, No. 17-1271 (U.S. Jan. 8, 2019).

#### **POSITIONS ON ISSUES RENDERED MOOT**

##### **1. Plaintiff's Position on General Status and Issues Rendered Moot.**

The Supreme Court decided that the "wholly groundless" exception is inconsistent with the Federal Arbitration Act. This Court denied Defendants' motions to compel arbitration partially on that ground. *See* Dkt. No. 63, at 14-17. The Court also denied the motions on the independent ground that the parties did not clearly and unmistakably agree to arbitrate the arbitrability of actions seeking injunctive relief. *See id.* at 13-14. That delegation issue, and whether non-signatories to the arbitration agreement can invoke equitable estoppel, remain before the Fifth Circuit. Pursuant to that Court's request, the parties filed supplemental briefs on those issues on Monday, February 25, 2019.

Because the Supreme Court addressed only the wholly groundless exception, no other motions, issues, claims, or portions thereof before this Court are rendered moot by the Court's opinion. All of the claims and issues raised in Archer's Second Amended Complaint, Dkt. No. 261, remain live.

Archer's position is that the Court should schedule a motions hearing in July and a trial setting in September or October. Archer intends to move for an amended docket control order along those lines shortly. Archer agrees with defendants that the Fifth Circuit likely will issue a decision soon, but that decision probably will return the case to this Court for trial because the arbitration clause does not clearly and unmistakably delegate arbitrability. This Court previously

denied Defendants' motions to compel arbitration for that very reason, Dkt. No. 63, at 12-14, and the Fifth Circuit said that Archer has a "strong argument" against delegation. C.A. Op. at 8.

There is no need for a stay pending the Fifth Circuit's decision. Both this Court and the Fifth Circuit denied Defendants' previous motions to stay pending appeal. *See* Dkt. Nos. 88, 326. There is no harm in putting this case on the Court's calendar. If the Fifth Circuit has not issued a decision by July (when Archer proposes a hearing), the Court and the parties can reassess at that time. But there is no reason to keep the case off of the Court's calendar.

This case was filed in 2012. It has dragged on long enough. Issuing a stay and declining to set a trial date will only cause further needless delay.

## **2. Defendants' Position on General Status and Issues Rendered Moot.**

This case is currently before the Fifth Circuit on remand from the Supreme Court. Should the Fifth Circuit decide to refer the case to arbitration, all of the issues before this Court would be moot. Defendants' position, therefore, is that the Fifth Circuit should be given the opportunity to decide whether this case should be sent to arbitration before this Court takes any further action.

Defendants expect that this will happen quickly. The Supreme Court issued its mandate on February 11, 2019 and, two days later, on February 13, 2019, the Fifth Circuit gave the parties 12 days to submit simultaneous supplemental briefs addressing the impact of the Supreme Court's decision on the remaining arbitration issues in the appeal. The parties filed their supplemental briefs on February 25, 2019. Oral argument has not been scheduled. A decision is expected shortly.

Accordingly, given the pendency of the appeal and the possibility the Court of Appeals may in short order direct that the case be sent to arbitration, Defendants respectfully request that

the Court stay this case pending further ruling from the Fifth Circuit. Contemporaneous with this submission, Defendants are filing a motion to stay this case pending the Fifth Circuit's ruling. The Supreme Court unanimously stayed all proceedings below pending its disposition of the issues before it. Under the Supreme Court's standard for a stay, this indicated that Supreme Court had concluded that irreparable harm would result from allowing the case to be litigated in court before the arbitration issues could be resolved. *Barnes v. E-Systems, Inc. Group Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1302 (1991). The Supreme Court subsequently remanded to the Fifth Circuit "for further proceedings consistent with this opinion" in order to allow the Fifth Circuit to resolve the remaining arbitration issues on appeal. For the same reasons that supported the Supreme Court's entry of a stay until issues regarding arbitration could be resolved, Defendants respectfully submit that a brief stay is warranted here to allow the Fifth Circuit to rule on the remaining arbitration issues.

#### **JOINT LIST OF MOTIONS BEFORE THE COURT**

Subject to the statements above, the motions listed below still present live issues for the Court to resolve. Please note that briefing is complete on these motions:

##### **1. Discovery Motions**

- Dkt. Nos. 220, 240, 248 – Joint Submission on Disagreement Over the Redaction of the Amended Complaint
- Dkt. Nos. 228, 239 – Plaintiff's Motion to Compel Patterson to Produce Investigation Materials<sup>1</sup>

##### **2. Motions to Dismiss**

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<sup>1</sup> The Court already granted part of this motion, but carried the portion with respect to government investigation materials until the Initial Pretrial Conference. *See* Dkt. No. 391.

- Dkt. Nos. 276, 284 – Benco’s Motion to Dismiss Second Amended Complaint
- Dkt. Nos. 278, 287, 305, 315 – Patterson’s Motion to Dismiss Second Amended Complaint
- Dkt. Nos. 279, 290, 313, 316 – Manufacturing Defendants’ Motion to Dismiss Second Amended Complaint
- Dkt. Nos. 280, 290, 312, 316 – Danaher Corp.’s Motion to Dismiss Second Amended Complaint
- Dkt. Nos. 288, 317, 327, 334 – Schein’s Motion to Dismiss Second Amended Complaint

**3. Motions for Summary Judgment**

- Dkt. Nos. 289, 353, 365, 396 – Patterson’s Motion for Summary Judgment
- Dkt. Nos. 292, 353, 370, 396 – Benco’s Motion for Summary Judgment
- Dkt. Nos. 293, 353, 367, 396 – Schein’s Motion for Partial Summary Judgment
- Dkt. Nos. 296, 353, 368, 396 – Schein’s Motion for Summary Judgment on Horizontal Conspiracy Claims
- Dkt. Nos. 299, 353, 371, 396 – Manufacturer Defendants’ Motion for Summary Judgment
- Dkt. Nos. 352, 367 n.5, 372 – Plaintiff’s Objections to Defendants’ Summary Judgment Evidence
- Dkt. Nos. 364, 395 – Benco’s Objections to Archer’s Summary Judgment Evidence
- Dkt. Nos. 369, 395 – Schein’s Objections to Archer’s Summary Judgment Evidence
- Dkt. Nos. 372, 395 – Manufacturer Defendants’ Objections to Archer’s Summary Judgment Evidence

**4. Motions to Exclude Expert Testimony**

- Dkt. Nos. 291, 319 – Plaintiff’s Motion to Strike Expert Designations of Defendants’ Non-Retained Experts<sup>2</sup>
- Dkt. Nos. 298, 322, 350, 366 – Defendants’ Joint Motion to Exclude the Testimony of Archer’s Expert Witnesses

**5. Motions in Limine**

- Dkt. Nos. 332, 380, 387 – Plaintiff’s Motions in Limine
- Dkt. Nos. 358, 378 – Defendants’ Omnibus Motion in Limine

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<sup>2</sup> Though the Court has not ruled on this motion, the Defendants withdrew the designations, and the parties agree that the motion is moot for that reason. *See* Dkt. No. 319.

**JOINT LIST OF OTHER PENDING PRE-TRIAL MATTERS**

**1. Deposition Designations**

The Parties exchanged initial designations. The Parties have not yet exchanged counter-designations and objections. Nor have the parties exchanged objections and counter designations to the initial counter designations.

**2. Witness Lists**

The Parties exchanged initial witness lists. The Parties have not yet exchanged updated witnesses lists or any objections.

**3. Exhibit Lists**

The Parties exchanged initial exhibit lists. The Parties have not yet exchanged updated exhibit lists or any objections.

**4. Joint Proposed Jury Instructions and Form of Verdict**

The Parties have not exchanged draft Proposed Jury Instructions or a Form of Verdict.

**5. Joint Pre-Trial Order**

The Parties have not exchanged a draft Joint Pre-Trial Order.

Dated: March 1, 2019.

**McKool Smith, P.C.**

/s/ Samuel F. Baxter

Samuel F. Baxter  
Texas State Bar No. 01938000  
sbaxter@McKoolSmith.com

**McKool Smith, P.C.**

104 E. Houston, Suite 300  
Marshall, Texas 75670  
Telephone: (903) 923-9000  
Facsimile: (903) 923-9099

Lewis T. LeClair  
Texas State Bar No. 12072500  
lleclair@mckoolsmith.com

Gary Cruciani  
Texas State Bar No. 05177300  
gcruciani@McKoolSmith.com

Phillip Aurentz  
Texas State Bar No. 24059404  
paurentz@McKoolSmith.com

Travis E. DeArman  
Texas State Bar No. 24074117  
tdearman@McKoolSmith.com

Chelsea A. Priest  
Texas State Bar No. 24102375  
cpriest@McKoolSmith.com

**McKool Smith, P.C.**

300 Crescent Court Suite 1500  
Dallas, TX 75201  
Telephone: (214) 978-4000  
Facsimile: (214) 978-4044

Charles E. Fowler, Jr.  
Texas State Bar No. 24083014  
cfowler@McKoolSmith.com

**McKool Smith, P.C.**

300 W. 6th Street, Suite 1700  
Austin, TX 78701  
Telephone: (512) 692-8700  
Facsimile: (512) 692-8744

***ATTORNEYS FOR PLAINTIFF,  
ARCHER AND WHITE SALES, INC.***



/s/ James J. Long

---

James J. Long (pro hac vice)  
Scott M. Flaherty (pro hac vice)  
Ruvn S. Jayasuriya (pro hac vice)  
Jay W. Schlosser (pro hac vice)  
Mark G. Schroeder (pro hac vice)

**BRIGGS AND MORGAN, P.A.**

2200 IDS Center, 80 South Eighth Street  
Minneapolis, MN 55402

612.977.8745

612.977.8650 (fax)

jlong@briggs.com

sflaherty@briggs.com

rjayasuriya@briggs.com

jschlosser@briggs.com

mschroeder@briggs.com

Clyde Moody Siebman

Stephanie Rene' Barnes

**SIEBMAN, BURG, PHILLIPS & SMITH LLP**

4949 Hedgcoxe Road

Suite 230

Plano, TX 75024

214-387-9100

214-387-9125 (fax)

clydesiebman@siebman.com

stephaniebarnes@siebman.com

***ATTORNEYS FOR THE PATTERSON  
COMPANIES, INC.***

/s/ Paul F. Schuster

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Paul F. Schuster

pschuster@lockelord.com

John P. McDonald

jpmcdonald@lockelord.com

Matthew K. Hansen

mkhansen@lockelord.com

**LOCKE LORD LLP**

2200 Ross Avenue, Suite 2800

Dallas, Texas 75201

Telephone: (214) 740-8000

Facsimile: (214) 740-8800

Colin R. Kass (pro hac vice)

ckass@proskauer.com

Stephen Chuk (pro hac vice)  
schuk@proskauer.com  
**PROSKAUER ROSE LLP**  
1001 Pennsylvania Avenue NW  
Washington, DC 20016  
Telephone: (202) 416-5865  
Facsimile: (202) 416-6899

Barack S. Echols (pro hac vice)  
barack.echols@kirkland.com  
Richard C. Godfrey, P.C. (pro hac vice)  
richard.godfrey@kirkland.com  
J. Andrew Langan, P.C. (pro hac vice)  
andrew.langan@kirkland.com  
**KIRKLAND & ELLIS LLP**  
300 North LaSalle Street  
Chicago, Illinois 60654  
Telephone: (312) 862-2000  
Facsimile: (312) 862-2200

***ATTORNEYS FOR DEFENDANT  
HENRY SCHEIN, INC.***

/s/ Howard D. Scher  
Howard D. Scher (admitted pro hac vice)  
Kenneth L. Racowski (admitted pro hac vice)  
**BUCHANAN INGERSOLL & ROONEY PC**  
Two Liberty Place, Suite 3200  
50 South 16th Street  
Philadelphia, PA 19102  
(215) 665-8700  
howard.scher@bipc.com  
kenneth.racowski@bipc.com

T. John Ward  
Claire Abernathy Henry  
**WARD, SMITH & HILL, PLLC**  
1507 Bill Owens Parkway  
Longview, TX 75604  
(903) 757-6400  
tjw@wsfirm.com  
claire@wsfirm.com

***ATTORNEYS FOR DEFENDANT  
BENCO DENTAL SUPPLY COMPANY***

*/s/ Jonathan B. Pitt*

Robert v. Van Kirk (pro hac forthcoming)

Jonathan B. Pitt (pro hac vice)

Liam J. Montgomery (pro hac vice)

**WILLIAMS & CONNOLLY LLP**

725 Twelfth Street, N.W.

Washington, DC 20005

Tel: (202) 434-5000

Fax: (202) 434-5029

rvasnkirk@wc.com

jpitt@wc.com

lmontgomery@wc.com

*/s/ Jennifer H. Doan*

Jennifer H. Doan

Texas Bar No. 08809050

Joshua R. Thane

Texas Bar No. 24060713

**HALTOM & DOAN**

6500 Summerhill Rd., Suite 100

Texarkana, Texas 75503

Telephone (903) 255-5100

Facsimile (903) 255-0800

E-Mail: jdoan@haltomdoan.com

E-Mail: jthane@haltomdoan.com

***COUNSEL FOR DEFENDANTS***

***DANAHER CORP.,***

***INSTRUMENTARIUM DENTAL INC.,***

***DENTAL EQUIPMENT LLC, KAVO***

***DENTAL TECHNOLOGIES, LLC, AND***

***DENTAL IMAGING TECHNOLOGIES***

***CORPORATION***

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing document has been served on all counsel of record via ECF on March 1, 2019.

/s/ Samuel F. Baxter

Samuel F. Baxter